UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2005

Argued: January 19, 2006 Decided: August 2, 2006)

Docket No. 05-2289-cr

- - - - - - - - - - - - - -
UNITED STATES OF AMERICA,
Appellant,

v.

ERIC JONES,
Defendant-Appellee.
- - - - - - - - - - - - - - -

Before: WALKER, Chief Judge, NEWMAN and KATZMANN, Circuit Judges.

Appeal from the April 5, 2005, judgment of the United States District Court for the Western District of New York (David G. Larimer, District Judge), sentencing the Defendant primarily to 15 months' imprisonment. The Government challenges the sentence as insufficiently explained and unreasonably low.

Sentence affirmed, and case remanded for amendment of the judgment to include a statement of the sentencing judge's reasons, which were stated in open court. Chief Judge Walker dissents in a separate opinion.

Steve Baczynski, Asst. U.S. Atty., Rochester, N.Y. (Michael A. Battle, U.S. Atty., Rochester, N.Y., on the brief), for Appellant.

Roxanne Mendez Johnson, Asst. Federal Defender, Rochester, N.Y. (Jay S. Ovsiovitch, of counsel, on the brief,

for Appellee.

JON O. NEWMAN, Circuit Judge.

This appeal of a sentence by the Government presents three issues: (1) whether the District Judge provided an adequate explanation for imposing a non-Guidelines sentence below the applicable Guidelines range to permit appellate review for reasonableness, (2) if so, whether the sentence is reasonable, and (3) if so, whether the judgment must be corrected to include the District Judge's reasons for the sentence. The appeal is from the April 5, 2005, judgment of the District Court for the Western District of New York (David G. Larimer, District Judge), sentencing Defendant-Appellee Eric Jones primarily to 15 months' imprisonment. We conclude that the District Judge's oral statement of reasons for the sentence set forth on the record was adequate, that the sentence is reasonable, but that the failure to include the reasons for the sentence in the judgment violates 18 U.S.C. § 3553(c)(2) and requires correction of the judgment. We therefore affirm the sentence, but remand for correction of the judgment.

Background

The pending case arose when Rochester, New York, police arrested Jones in September 2004 in the barbershop where he worked. They found five bags of marijuana and three firearms. Jones admitted that he was the owner of the drugs and the guns, at least one of which he said was

for his protection. The police arrested Jones for violation of state law. Nine months later the matter was taken over by federal authorities, and a federal grand jury indicted Jones on one count of being a felon in possession of firearms, in violation of 18 U.S.C. § 922(g)(1), and one count of possession of "a detectable amount" of marijuana, in violation of 21 U.S.C. § 844(a). Jones had previously been convicted on a guilty plea of attempted criminal possession of a controlled substance in the third degree and sentenced to six weeks' imprisonment and five years' probation. He was discharged from probation in April 2002.

In November 2004, Jones pleaded guilty to the firearms count pursuant to a plea agreement specifying that the agreed Guidelines range under the then-mandatory Guidelines was 30-37 months. After the Supreme Court decided United States v. Booker, 543 U.S. 220 (2005), on January 12, 2005, the District Court indicated that it would not accept the plea in Jones's case with its stipulated sentencing range of 30-37 months. At a hearing in March 2005, Judge Larimer indicated that he considered that range too harsh. In anticipation of a more lenient sentence, Jones withdrew his guilty plea and pleaded guilty to both counts.

Sentencing occurred at the end of March. Judge Larimer noted that the applicable sentencing range remained 30-37 months. He then mentioned two matters that he found "troubling." First, Jones had

been unemployed for the past month, contrary to the representation of his defense counsel that he was currently employed. Second, Jones tested positive for marijuana on the day of sentencing. Upon inquiry by the Court, Jones explained that his work for his current employer was sporadic and that he did some part-time work that was not "on their books." Jones acknowledged marijuana use, which his lawyer attributed to stress in his life stemming from the recent death of his father.

After hearing from the Government, defense counsel, and Jones, Judge Larimer explained the thinking that prompted him to give a non-Guidelines sentence. Initially, he acknowledged the seriousness of the offenses, especially in view of the prior state drug conviction. He then referred to factors that he considered to count in Jones's favor. These included a "consistent work ethic," Jones's support of his wife and son, his assistance and support for other members of his family, his recent loss of his father, his attempt at college, his "very good and positive" adjustment to state probation, and the fact that Jones would be on supervised release for three years and would have to be "prepared for a much stiffer sentence" if he violated supervised release. The Judge candidly acknowledged that part of his thinking was not explainable: "I just had a gut feeling about you"; "I still have the sense that Eric Jones is capable of doing much better." Finally, Judge Larimer noted that he had considered all of the

sentencing factors under 18 U.S.C. § 3553(a) and the applicable guideline and was "convinced that a non-guidelines sentence here is appropriate." Judge Larimer imposed a sentence of 15 months' imprisonment, followed by three years of supervised release.

Discussion

I. Sufficiency of the Reasons for a Non-Guidelines Sentence

After Booker, a sentencing judge remains obligated "to state in open court the reasons for its imposition of the particular sentence." 18 U.S.C. § 3553(c); see United States v. Lewis, 424 F.3d 239, 244-45 (2d Cir. 2005); United States v. Crosby, 397 F.3d 103, 116 (2d Cir. 2005). Booker left section 3553(c) "unimpaired." Crosby, 397 F.3d at 116.

The Government challenges Judge Larimer's reasons for imposing a non-Guidelines sentence on essentially two grounds. First, the Government contends that several of the reasons relied upon, notably the Defendant's education, emotional condition, favorable employment record, family support, and good record on state probation are factors that the Sentencing Commission has concluded are "ordinarily" not relevant "in determining whether a departure is warranted." See U.S.S.G. §§ 5H1.2 (education); 5H1.3 (emotional condition); 5H1.5 (employment record); 5H1.6 (family ties); 5H1.11 (prior good works). By citing the Guidelines' departure standards, however, the Government fails to appreciate that Jones's post-Booker sentence is not a

Guidelines departure; it is a non-Guidelines sentence. See Crosby, 397 F.3d at 111 n.9. With the entire Guidelines scheme rendered advisory by the Supreme Court's decision in Booker, the Guidelines limitations on the use of factors to permit departures are no more binding on sentencing judges than the calculated guidelines ranges themselves. Of course, a sentencing judge's obligation to "consider" the Guidelines, see 18 U.S.C. § 3553(a)(4), along with the other relevant factors listed in section 3553(a), see United States v. Canova, 412 F.3d 331, 350 (2d Cir. 2005), includes the obligation to consider the Commission's relevant policy statements as well as the calculated Guidelines range. But "consideration" does not mean mandatory adherence.

The Government's misconception concerning the force of the Commission's policy statements limiting departures is illustrated by its reliance on decisions of this Court rendered before the Supreme Court's decision in Booker. See Brief for Appellant at 14 (citing United States v. Mora, 28 F.3d 409 (2d Cir. 1994), and United States v. Stevens, 192 F.3d 263 (2d Cir. 1999)).

Second, the Government challenges Judge Larimer's expression of the subjective component of his thinking as to the appropriateness of a non-Guidelines sentence. As the Government notes, Judge Larimer said he had "the sense" that Jones is capable of doing better and that he had a "gut feeling" about Jones. We think this criticism, too,

fails to appreciate the enhanced scope of a sentencing judge's discretion in the post-Booker world of advisory Guidelines. Although the sentencing judge is obliged to consider all of the sentencing factors outlined in section 3553(a), the judge is not prohibited from including in that consideration the judge's own sense of what is a fair and just sentence under all the circumstances. That is the historic role of sentencing judges, and it may continue to be exercised, subject to the reviewing court's ultimate authority to reject any sentence that exceeds the bounds of reasonableness.

It is true that, after explaining his reasons for the particular non-Guidelines sentence he intended to impose, Judge Larimer gave no specific articulation as to why 15 months was the appropriate amount of punishment, i.e., why the sentence was 15 months, rather than, say, 14 or 16 months. We decline to impose a requirement for such specific articulation of the exact number of months of an imposed sentence. Selection of an appropriate amount of punishment inevitably involves some degree of subjectivity that often cannot be precisely explained. In light of the reasons of the sort identified by Judge Larimer, a sentencing judge has many available guideposts in ultimately selecting an amount of punishment. The judge undoubtedly is familiar with the maximum penalty authorized by Congress and the proportion of that maximum that a particular sentence reflects. The judge is also aware of both the calculated guidelines range and the sentences typically

imposed in the district for misconduct of comparable seriousness.

Judge Larimer's reasons for the non-Guidelines sentence he imposed, even if not "ordinarily" grounds for a pre-Booker Guidelines departure and even though influenced in part by his subjective assessment of the Defendant, are adequate to support his conclusion that a post-Booker non-Guidelines sentence was appropriate for Eric Jones, and they suffice to satisfy the statutory requirement to state "the reasons for [the court's] imposition of the particular sentence." 18 U.S.C. § 3553(c).

II. Reasonableness of the Non-Guidelines Sentence

We recently reviewed a challenge to a non-Guidelines sentence, alleged to be unreasonable, in United States v. Fairclough, 439 F.3d 76 (2d Cir. 2006). In Fairclough, a defendant challenged as unreasonable a sentence of 48 months, which was 21 months higher than the top of the calculated Guidelines range. In approving the non-Guidelines sentence, which was vigorously defended by the Government, we emphasized that "'"reasonableness" is inherently a concept of flexible meaning, generally lacking precise boundaries,'" id. at 79 (quoting Crosby, 397 F.3d at 115), that a reviewing court "'should exhibit restraint'" in assessing reasonableness, id. (quoting United States v. Fleming, 397 F.3d 95, 100 (2d Cir. 2005), that "'we anticipate encountering . . . circumstances [warranting rejection of a sentence as unreasonable] infrequently,'" id. (quoting Fleming, 397

F.3d at 100), and that we would not "'fashion any per se rules as to the reasonableness of every sentence within an applicable guideline or the unreasonableness of every sentence outside an applicable guideline,'" id. (quoting Crosby, 397 F.3d at 115).

In the pending case, the sentence of 15 months is 15 months less than the bottom of the calculated Guidelines range. In Fairclough, the non-Guidelines sentence was 21 months above the top of the calculated Guidelines range. If we are to be deferential when the Government persuades a district judge to render a non-Guidelines sentence somewhat above the Guidelines range, we must be similarly deferential when a defendant persuades a district judge to render a non-Guidelines sentence somewhat below the Guidelines range. Obviously, the discretion that Booker accords sentencing judges to impose non-Guidelines sentences cannot be an escalator that only goes up.

Of course, in any particular case a sentence, assessed even against the flexible standard of reasonableness, might be so far above or below a Guidelines range and so inadequately explained by the sentencing judge as to require rejection on appeal. But we continue to believe that we will "'encounter such circumstances infrequently,'" Fairclough, 439 F.3d at 79 (quoting Fleming, 397 F.3d at 100), and do not consider Jones's sentence to be one of those circumstances.

In the pending case, we cannot say that, for a defendant with

Jones's characteristics and background, 15 months of imprisonment is unreasonable for possession of a detectable amount of marijuana, even though exacerbated by possession of guns, at least one of which was possessed for protection.

III. Omission of Reasons from the Written Judgment

The Sentencing Reform Act contains three provisions concerning a sentencing court's obligation to state the reasons for a sentence. First, the court must in all cases state "the reasons for its imposition of the particular sentence." 18 U.S.C. § 3553(c). Second, if the sentence is within an applicable Guideline range that exceeds 24 months, the judge must state "the reason for imposing a sentence at a particular point within the range." Id. § 3553(c)(1). Third, if the sentence is outside an applicable Guideline range, the judge must state "the specific reason for the imposition of a sentence different" from that prescribed by the Guideline range. Id. § 3553(c)(2). Compliance with all three requirements, where applicable, must be made "at the time of sentencing" and "in open court." Id. § section 3553(c). Compliance with the second and third requirements, where applicable, must "also be stated with specificity in the written order of judgment and commitment." Id. § 3553(c)(2).[1] We have ruled that the

[1]The additional requirement of including the reasons for subsection 3553(c)(1) and subsection 3553(c)(2) sentences in the written judgment is contained within subsection 3553(c)(2) itself, but

Supreme Court's decision in Booker left section 3553(c) "unimpaired." See United States v. Lewis, 424 F.3d 239, 244 (2d Cir. 2005); United States v. Crosby, 397 F.2d 103, 116 (2d Cir. 2005).

In the pending case, as we have ruled above, Judge Larimer provided on the record in open court a sufficient statement of reasons for his non-Guidelines sentence to permit our review for reasonableness, thereby complying with the first requirement of section 3553(c). However, the statement of reasons was not included in the written order of judgment and commitment, as additionally required by subsection 3553(c)(2) for a sentence outside the applicable Guidelines range. That omission requires consideration of the appropriate remedy.

In United States v. Fuller, 426 F.3d 556 (2d Cir. 2005), this Court ruled that non-compliance with subsection 3553(c)(2) did not require a remand. Id. at 567. Fuller was a pre-Booker case in which the sentence, though a departure from the applicable guideline, was imposed under the mandatory Guidelines regime. More recently in United States v. Goffi, 446 F.3d 319 (2d Cir. 2006), this Court, again

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the added requirement applies to sentences under both subsections. This is evident from the fact that subsections 3553(c)(1) and 3553(c)(2) both refer to "reason" in the singular, but the written requirement language of subsection 3553(c)(2) uses the plural to state that the "reasons" must be included in the judgment.

considering a sentence that did not comply with subsection 3553(c)(2), ruled that "the better course" was to affirm the sentence but remand "with instructions that [the District Court] amend the written judgment to comply with 18 U.S.C. § 3553(c)(2)." Id. at 322 n.2, 323. Although Goffi was originally sentenced pre-Booker, his sentence for violation of probation, which was the sentence considered on appeal, was imposed post-Booker. See id.

We have concluded that, with respect to a non-Guidelines sentence like that imposed in the pending case, we should use the remedy adopted in Goffi and remand for amendment of the judgment to comply with subsection 3553(c)(2). With the broader discretion available to sentencing judges under the advisory Guidelines regime of Booker, it will generally be helpful to the reviewing court (and to agencies such as the Sentencing Commission and the Bureau of Prisons) to have the judge's statement of reasons for a sentence outside an applicable guideline conveniently set forth in the written order of judgment and commitment. Although Fuller, a case decided under the mandatory Guidelines regime, did not remand to correct non-compliance with subsection 3553(c)(2), in the pending case, which involves a non-Guideline sentence under the advisory Guidelines regime, we agree with Goffi that "the better course" is to remand so that non-compliance with subsection 3553(c)(2) may be remedied.[2]

[2]We need not set the sentence aside pursuant to 18 U.S.C.

§ 3742(f)(2)(B), which requires such action upon a Government appeal if the reviewing court determines that the sentence is "too low." We have determined that the sentence, reviewed for "reasonableness," is not "too low," and we twice stated that a sentence deemed on appellate review to be neither "too high" nor "too low" need not be vacated for non-compliance with subsection 3553(c)(2). See Fuller, 426 F.3d at 566; United States v. Santiago, 384 F.3d 31, 37-37 (2d Cir. 2004) (stating in dicta that "[u]nder subsection [3742](f)(2), then, it seems clear that if we ultimately decide that a sentence is neither 'too high' (subsection (A)) nor 'too low' (subsection (B)), we do not have any obligation to remand [for resentencing]," but nevertheless remanding for correction of judgment). See also United States v. Cooper, 394 F.3d 172, 176 (3d Cir. 2005) (declining to remand because of non-compliance with subsection 3553(c)(2)); United States v. Daychild, 357 F.3d 1082, 1107-08 (9th Cir. 2004) (same); United States v. Orchard, 332 F.3d 1133, 1141 n.7 (8th Cir. 2003) (same).

In dissent, Chief Judge Walker suggests that we are implicitly revising the statutory terms "too high" and "too low" to mean "unreasonably too high" and "unreasonably too low." We disagree. We take these statutory terms as we find them. Of course, when Congress refers to a sentence that is "too" high or "too" low, there has to be some benchmark against which to assess the highness or lowness. In

Conclusion

The sentence of the District Court is affirmed, and the case is remanded with instructions to amend the written judgment to comply with 18 U.S.C. § 3553(c)(2).

Booker, the Supreme Court instructed us to use "reasonableness" as that benchmark. We do not require that a sentence be "unreasonably too high" or "unreasonably too low" before we will vacate it under section 3742(f)(2); we will vacate when the sentence is "too high" or "too low" compared to sentences within the range of reasonableness.